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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ROOSEVELT MOORE, Defendant and Appellant.	B260667 (Los Angeles County Super. Ct. No. NA007617)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard Romero, Judge. Affirmed and remanded with directions.

Jonathan B. Steiner and Kathleen Caverly, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb and Mary Sanchez Deputy Attorneys General for Plaintiff and Respondent.

I. INTRODUCTION

Following a jury trial, defendant Roosevelt Moore was convicted of: nine counts of forcible rape (Pen. Code § 261, subd. (a)(2));[1] seven counts of forcible oral copulation (§ 288a, subd. (c)); two counts of attempted second degree robbery (§§ 664, 211); two counts of second degree robbery (§ 211); forcible sodomy (§ 286, subd. (c)); kidnapping with intent to commit a felony sex offense (§§ 207, 667.8, subd. (a)); genital penetration by a foreign object (§ 289); and unlawful driving or taking of a vehicle (Veh. Code, § 10851, sub. (a)). The jury also found defendant personally used a firearm (§§ 12022.3, subd. (a), 12022.5, subd. (a)) during the commission of all crimes with the apparent exceptions of kidnapping and the Vehicle Code offense. Defendant was sentenced to 254 years and 4 months in state prison. Defendant was 16 years old at the time he committed his crimes. (*Moore v. Biter* (9th Cir. 2013) 725 F.3d 1184, 1186.)

We affirmed the judgment in an unpublished opinion. (*People v. Moore* (May 27, 1993, B065363) [nonpub. opn.].) On May 17, 2010, the United States Supreme Court filed its opinion in *Graham v. Florida* (2010) 560 U.S. 48. *Graham* held the imposition of life without parole (LWOP) sentences on juveniles who were not convicted of a homicide violates the Eighth Amendment. (*Graham*, *supra*, 560 U.S. at p. 82.) Defendant filed state habeas corpus petitions before the trial court, this court, and our Supreme Court, arguing that, even though he did not receive an LWOP sentence, his punishment was unconstitutional under *Graham*. (*Moore v. Biter*, *supra*, 725 F.3d at p. 1187.) Defendant's petitions were denied. (*Ibid.*)

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[1]Further statutory references are to the Penal Code unless otherwise stated.

Defendant subsequently filed a federal habeas corpus petition which a federal district court denied. (*Ibid*.)

On August 7, 2013, the United States Court of Appeals for the Ninth Circuit issued a published opinion reversing the federal district court. (*Moore v. Biter*, *supra*, 725 F.3d at p. 1186.) Citing *Graham*, the Ninth Circuit found defendant's sentence was materially indistinguishable from a life sentence. (*Id.* at pp. 1191-1192.) The Ninth Circuit ordered the federal district court to grant defendant's petition. (*Id.* at p. 1194.) On July 30, 2014, the federal district court issued a conditional writ of habeas corpus giving the state 90 days in which to resentence defendant in a manner consistent with *Graham*, or to release him.

On October 24, 2014, the trial court resentenced defendant to the same 254 years 4 months sentence. The trial court stated that it considered all the arguments at the original sentencing as well as the mitigating circumstances at the time, including: defendant's age; defendant's capacity to change; and defendant's diminished moral culpability. The trial court also ordered the Department of Corrections and Rehabilitation to provide defendant a full and meaningful parole hearing on his 62nd birthday.

On December 8, 2015, this court issued its opinion affirming the resentence. (*People v. Moore* (Dec. 8, 2015, B260667) [nonpub. opn.].) We held the sentence did not violate the Eighth Amendment because it provided defendant with a parole hearing within his expected natural life. (*Ibid*.) We did not address the application of section 3051, i.e., newly enacted legislation that, in some instances, shortens the time for young incarcerated felons to receive parole hearings. (*Ibid*.) Defendant filed a petition for review in the California Supreme Court. The

Supreme Court granted review and, following its decision in *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*), transferred the matter to us for reconsideration in light of *Franklin*.

We have considered the supplemental briefs filed by the parties and hold that, as was the case in *Franklin*, the passage of section 3051 mooted defendant's appeal. However, we remand the case to the trial court to determine whether defendant had sufficient opportunity to develop a record of information relevant to a youth offender parole hearing conducted pursuant to sections 3051 and 4801.

II. BACKGROUND

A. The Crimes

We discussed the facts underlying the criminal convictions in a prior opinion. (*People v. Moore, supra*, B065363.) They are briefly summarized below.

Defendant victimized four women on four occasions over a five-week period. At approximately 6:00 p.m. on February 1, 1991, Leslie H. was walking home when defendant approached with a gun and ordered her into a nearby alley. While threatening to shoot her, he raped her three times, sodomized her, and twice forced her to orally copulate him. Defendant asked Leslie H. if she had any money and, when she stated she did not, he ordered her to empty her pockets. He then told her to leave.

On March 4, 1991, at approximately 1:30 p.m., Therese M. was inspecting a house in Long Beach. As she stood in the doorway, defendant approached her, pulled out a gun, and ordered her into the house. He pushed her into the bathroom and required her to undress. Defendant raped Therese M. four times and forced her to orally copulate him five times. Defendant

asked her for money, but she stated she did not have any. He wanted her to go to the bank and withdraw money from the automated teller machine. Therese M. said she would provide him with her bank card but she would not accompany him to the bank. Defendant exited the bathroom. After Therese M. shut the door and started screaming, defendant left the house.

On March 5, 1991, at approximately 8:00 p.m., Nancy W. was standing in an alley behind her garage. Defendant drove up, pointed a gun at her, and ordered her into the car. He warned her that if she made any noise he would "blow [her] head off." Defendant demanded money from her. Although Nancy W. offered to go to an automated teller machine, defendant opted to drive her to another alley where he forced her to orally copulate him. Ultimately, Nancy W. was able to roll out of the car and run away. She left her purse, earrings, and groceries behind.

On March 7, 1991, at approximately 6:30 p.m., Patricia S. was walking from her car to her apartment when defendant approached her and pointed a gun at her. He ordered her to take him to her apartment. Defendant warned her that if she said anything he would kill her. He took $39 from her and ordered her to undress. Defendant then sexually assaulted Patricia S.—he forced her to orally copulate him twice, penetrated her vagina with a foreign object, and raped her twice. Before leaving the apartment, he returned some of the money and asked if she would go on another "date" with him.

B. The Sentence Calculation

The trial court imposed the above-referenced sentence (for the first time) on January 6, 1992. The sentence per count was as follows. Count 16, second degree robbery, was the principal term under section 1170.1. Defendant received the high term of five years plus five years under section 12022.5 for a total of ten years.

For counts 5 and 13, attempted robbery, the court imposed consecutive 24-month terms consisting of one-third the middle term of 24 months (eight months) for the underlying offenses plus one-third the middle term of 48 months (16 months) pursuant to section 12022.5, subdivision (a). On count 17, the Vehicle Code violation, the trial court imposed one-third the middle term of three years (one year). For count 19, robbery, the trial court imposed one-third the middle term of three years (one year) plus one-third the 48-month middle term (16 months) under section 12022.5. On count 14, kidnapping in connection with a sex offense, the trial court imposed one-third the middle term of nine years (three years). Counts 5, 13, 14, 17, and 19 were all imposed consecutively pursuant to section 1170.1, subdivision (a).

Counts 1, 8, 15, and 20, forcible oral copulation and forcible rape, were imposed under section 667.6, subdivision (d). The 1992 version of section 667.6, subdivision (d) provided in pertinent part: "A full, separate, and consecutive term *shall* be served for each violation of . . . subdivision (2) or (3) of Section 261 . . . or of committing . . . oral copulation in violation of Section . . . 288a by force, violence, duress, menace or fear of immediate and unlawful bodily injury on the victim or another person if the crimes involve separate victims or involve the same victim on separate occasions." (Italics added.) For counts 1, 8, 15, and 20,

the court imposed consecutive 13-year terms consisting of the high term of eight years for each offense, plus the high term of five additional years pursuant to section 12022.3, subdivision (a).

The remaining counts were imposed consecutively under the 1992 version of section 667.6, subdivision (c), which provided in pertinent part: "In lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation of . . . subdivision (2) or (3) of Section 261, . . . Section 289, or of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace or fear of immediate and unlawful bodily injury on the victim or another person whether or not the crimes were committed during a single transaction."

Consistent with section 667.6, a consecutive term of 13 years was imposed for each of the following offenses/counts: (a) forcible oral copulation (counts 2, 3, 22, and 23); (b) rape (counts 6, 7, 9, 10, 11, 12, 24, and 25); (c) penetration with a foreign object (count 4); (d) sodomy (count 21). Each term consisted of the eight-year high term for the offense plus the high term of five years for the enhancement under section 12022.3, subdivision (a).

III. DISCUSSION

A. Defendant's Appeal is Moot

"Although the state is by no means required to guarantee eventual freedom to a juvenile convicted of a nonhomicide offense, *Graham* holds that the Eighth Amendment requires the state to afford the juvenile offender a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation,' and that '[a] life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity.' [Citation.] The court observed that a life

without parole sentence is particularly harsh for a juvenile offender who 'will on average serve more years and a greater percentage of his life in prison than an adult offender.' [Citation.] *Graham* likened a life without parole sentence for nonhomicide offenders to the death penalty itself, given their youth and the prospect that, as the years progress, juveniles can reform their deficiencies and become contributing members of society. [Citation.]" (*People v. Caballero* (2012) 55 Cal.4th 262, 266 (*Caballero*).) Although *Graham* addressed the constitutionality of an LWOP sentence for juvenile offenders, the protections it affords have been extended to those juvenile offenders who are sentenced to a term of imprisonment with a parole eligibility date that falls outside the natural life expectancy of the offender. (*Id.* at p. 268.)

It is true that defendant's sentence is substantial. But, section 3051 (which was effective January 1, 2014) provides him with a parole eligibility date that passes constitutional muster and moots his appeal. (See *Franklin*, *supra*, 63 Cal.4th at p. 276.) As explained in subdivision (b)(1) of that section, "[a] person who was convicted of a controlling offense that was committed before the person had attained 23 years of age and for which the sentence is a determinate sentence shall be eligible for release on parole at a youth offender parole hearing by the board during his or her 15th year of incarceration, unless previously released pursuant to other statutory provisions."[2] "[T]he Legislature passed Senate Bill No. 260 [which added sections

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[2] When first enacted, section 3051 applied to youth offenders sentenced to state prison for crimes committed when they were under 18 years old. (Stats. 2013, ch. 312.) Defendant qualified under either version.

3051, 3046, subdivision (c), and 4801, subdivision (c)] explicitly to bring juvenile sentencing into conformity with *Graham*, *Miller* [*v. Alabama* (2012) 567 U.S. __ [132 S. Ct. 2455]],[3] and *Caballero*." (*Franklin*, *supra*, 63 Cal.4th at p. 277.)

"The Legislature did not envision that the original sentences of eligible youth offenders would be vacated and that new sentences would be imposed to reflect parole eligibility during the 15th, 20th, or 25th year of incarceration. The continued operation of the original sentence is evident from the fact that an inmate remains bound by that sentence, with no eligibility for a youth offender parole hearing, if 'subsequent to attaining 23 years of age' the inmate 'commits an additional crime for which malice aforethought is a necessary element . . . or for which the individual is sentenced to life in prison.' (§ 3051, subd. (h); Stats. 2015, ch. 471.) But section 3051 has changed the manner in which the juvenile offender's original sentence operates by capping the number of years that he or she may be imprisoned before becoming eligible for release on parole. The Legislature has effected this change by operation of law, with no additional resentencing procedure required." (*Franklin*, *supra*, 63 Cal.4th at pp. 278-279.)

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[3]*Miller* held a statutory scheme that mandated the imposition of LWOP for a defendant who committed murder while under the age of 18 violated the prohibition of cruel and unusual punishment set forth in the Eighth Amendment. (132 S. Ct. at p. 2461.) After *Miller*, to constitutionally impose LWOP in a juvenile case, the sentencing court is "require[d] . . . to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Id.* at p. 2469.)

In this instance, the 15th year after defendant's incarceration occurred prior to the effective date of section 3051. Under these circumstances, defendant should have received a parole hearing by July 1, 2015, or approximately twenty-three and one-half years after his incarceration. (§ 3051, subd. (i)(1) ["The board shall complete all youth offender parole hearings for individuals who became entitled to have their parole suitability considered at a youth offender parole hearing prior to the effective date of the act . . . by July 1, 2015."].)

As noted, *Graham* requires that states provide juvenile offenders like defendant "a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Graham*, *supra*, 560 U.S. at p. 75; *Caballero*, *supra*, 55 Cal.4th at p. 266.) The California Legislature, via section 3051, has provided defendant with an opportunity for parole after serving less than 24 years of his term, i.e., when he was approximately 40 years old. In other words, such a sentence is neither LWOP nor its functional equivalent. The possibility of parole is well within defendant's life expectancy thereby satisfying the constitutional requirements put into place by *Graham* and its progeny.

We recognize *Franklin* "limited its 'mootness holding' to circumstances in which 'section 3051 entitles an inmate to a youth offender parole hearing against the backdrop of an otherwise lengthy *mandatory* sentence' and expressed no view 'on *Miller* claims by juvenile offenders . . . who are serving lengthy sentences imposed under *discretionary* rather than mandatory sentencing statutes.' [Citation.]" (*People v. Cornejo* (2016) 3 Cal.App.5th 36, 67.) In this respect, we understand that, while the terms for many of the offenses were required to be imposed consecutively, the trial court had discretion to impose the low,

middle or high term for each of those offenses. Nevertheless, we agree with our colleagues in the Third District that the rationale for concluding that defendant's constitutional claim is rendered moot is not contingent on the imposition of a total term that is mandated by law. (*Id*. at p. 68.) Rather, the constitutional claim is defeated, and the appeal is rendered moot, by the opportunity for defendant to be paroled as early as the age of 40. (See *ibid*.; see also *State v. Delgado* (2016) 323 Conn. 801, 810-811.)[4]

B. Opportunity to Develop Record

Section 3051, subdivision (e), provides: "The youth parole hearing to consider release shall provide for a meaningful opportunity to obtain release."

Franklin explained the parameters of such a hearing as follows. "In directing the Board [of Parole Hearings] to 'give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner' (§ 4801, subd. (c)), the statutes also contemplate that information regarding the juvenile offender's characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate the Board's consideration. For example, section 3051, subdivision (f)(2) provides that '[f]amily members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the

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[4] Because we hold defendant's sentence is not the functional equivalent of a life sentence, we reject defendant's claims that: (a) the sentencing court failed to properly apply the *Miller* factors; and (b) counsel was ineffective for failing to properly argue the applicability of the *Miller* factors.

crime . . . may submit statements for review by the board.' Assembling such statements 'about the individual before the crime' is typically a task more easily done at or near the time of the juvenile's offense rather than decades later when memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away. In addition, section 3051, subdivision (f)(1) provides that any 'psychological evaluations and risk assessment instruments' used by the Board in assessing growth and maturity 'shall take into consideration . . . any subsequent growth and increased maturity of the individual.' Consideration of 'subsequent growth and increased maturity' implies the availability of information about the offender when he was a juvenile." (*Franklin*, *supra*, 63 Cal.4th at pp. 283-284.)

Because it was not clear whether Franklin received an adequate opportunity to put information on the record that could be relevant in a hearing conducted pursuant to sections 3051 and 4801, the Supreme Court remanded the case to the trial court "for a determination of whether Franklin was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*Franklin*, *supra*, 63 Cal.4th at p. 284.)

We are similarly uncertain whether defendant had sufficient opportunity to present information relevant to his parole hearing. Indeed, the prospect of such a hearing, much less its defined scope, was never mentioned by the parties or the resentencing court. As in *Franklin*, we remand the case to the trial court for that determination to be made.

IV. DISPOSITION

The appeal is moot. The sentence is affirmed and the case is remanded to the trial court to determine whether defendant Roosevelt Moore had sufficient opportunity to establish a record of information relevant to a parole determination made pursuant to Penal Code sections 3051 and 4801.

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KUMAR, J. *

We concur:

TURNER, P. J.

KRIEGLER, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.